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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 443

BUCKS COUNTY CABLE TV, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ROBERT T. BARTLEY, ET AL., AND U.S. COMMUNICATIONS CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT U.S. COMMUNICATIONS CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether a Federal Communications Commission rule, 47 C.F.R. § 74.1105(c), prohibiting a CATV system from carrying television broadcast signals until the Commission disposes of or otherwise acts on a timely filed petition challenging the proposed carriage is lawful.

STATEMENT

In 1966 the Federal Communications Commission adopted rules regulating the operations of community antenna television systems (CATV systems).[1] The Commission's jurisdiction to regulate CATV systems was sustained in *United States v. Southwestern Cable Co.*, 392 U.S. 157. The rules were upheld on the merits against a variety of challenges in *Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968).

The 1966 rules were the first FCC effort at comprehensive regulation of CATV practices, and they reflected the Commission's concern with the potential adverse impact of unregulated CATV operations on the development of the over-the-air system of television broadcast stations, among them new and still struggling UHF stations in markets like Philadelphia.[2] In the highly controversial area of "outside" signal carriage, the Commission decided that in the centers of the 100 leading broadcast markets CATV systems would not be allowed to import television broadcast signals from beyond their Grade B contours[3] without first having secured FCC permission to do so in an evidentiary hearing. 47 C.F.R. § 74.1107(a). In all cases CATV systems are to give notice to interested persons of their intention to commence operations and to identify the signals they intend to carry. In cases not covered by the prior evidentiary hearing

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[1] Second Report and Order on CATV, 2 F.C.C.2d 725, 31 F.R. 4540.

[2] The Second Report and Order on CATV, n.1, *supra*, repeatedly cited the Philadelphia market as the classic illustration of the adverse effects on local stations, especially developing UHF stations, that might ensue if CATV systems were permitted to carry television stations from another market (New York City). See 2 F.C.C.2d at 771-76, 31 F.R. at 4558-59.

[3] The Grade B contour is a theoretical line determined in accordance with FCC rules and intended to approximate the reach of a station's service area. See 47 C.F.R. § 73.683.

rule of 47 C.F.R. § 74.1107(a), an interested person may petition for special relief. 47 C.F.R. § 74.1109(a). If such a petition is filed within 30 days of the notice, the challenged service may not commence until the Commission acts on the petition. 47 C.F.R. § 74.1105(c).

The Commission specifically recognized that there would be cases of proposed "outside signal" carriage not covered by the letter of rule 74.1107(a), such as where the Grade B contour of a station from another market theoretically reaches the CATV community but that station does not purport to serve and is not generally viewed in the CATV community. It anticipated the use of special relief petitions in such cases.[4]

The essence of the FCC's approach to outside signal regulation was to examine CATV proposals before the service commenced, for the Commission was acutely aware of the impracticality of withdrawing service from the public once it had become entrenched.[5]

Hundreds of requests for evidentary hearings by CATV systems under rule 74.1107(a) were submitted in the months following adoption of the rules. There were also scores of special relief petitions. The Commission determined to deal with these requests and petitions on a market-by-market basis. In early 1968 it took up the Philadelphia television market where there had been numerous proposals for CATV carriage of outside signals, particularly signals from New York City. Some involved communities reached by the Grade B contours of the New York

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[4]Second Report and Order on CATV, 2 F.C.C.2d at 786, n.69; 31 F.R. at 4564, n.69.

[5]*Id.* at 781-82, 31 F.R. at 4562. And see Midwest Television, Inc., 4 F.C.C.2d 612, 31 F.R. 10335 (1966); Notice of Proposed Rule Making in Docket No. 18397, 15 F.C.C.2d 417, 33 F.R. 19028 (1968).

City stations and were before the Commission by virtue of special relief petitions.

In March 1968, the Commission set down a consolidated market-wide hearing on all CATV proposals for communities within 40 miles of Philadelphia. In those communities reached by the Grade B contours of the New York City stations, the FCC issued temporary orders to preclude the carriage of New York City signals pending the hearing.[6]

Shortly thereafter, petitioner gave its notice under rule 74.1105(a) of intention to provide CATV service in Falls Township, located less than 10 miles from Philadelphia, and to carry New York City signals (whose Grade B contours reached Falls Township). A timely petition for special relief was filed on behalf of Philadelphia UHF stations WPHL-TV and WIBF-TV which invoked the stay of section 74.1105(c) against petitioner's carriage of New York City signals. R. 3a-1.[7]

While the special relief petition was pending, the Commission on December 13, 1968, announced proposed revisions of its rules, which included the elimination of further evidentiary hearings and the substitution of fixed rules on CATV carriage of outside signals.[8] One of the proposed rules would preclude petitioner's carriage of New York City signals in Falls Township absent retransmission consent which petitioner did and does not have. The FCC also announced that in the interim pending final action on its proposed rule changes it would not act on pending cases involving proposed CATV operations inconsistent with the proposed rules. It further announced that CATV systems

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[6]Delaware County Cable Co., 12 F.C.C.2d 529, 33 F.R. 6561 (1968).

[7]References to the printed Joint Consolidated Appendix in the court below are cited "R. ___."

[8]Notice of Proposed Rule Making in Docket No. 18397, 15 F.C.C.2d 417, 33 F.R. 19028 (1968).

that had lawfully commenced service prior to December 20, 1968 (the date of publication of the proposed rules in the Federal Register), would be "grandfathered," even though their carriage was inconsistent with the proposed rules. This was another manifestation of the Commission's recognition of the impracticality of withdrawing service once commenced lawfully in reliance on its rules.

On December 19, 1968, petitioner began carrying New York City signals on its Falls Township system in violation of the FCC's rules. Thereafter, it instituted suit in the District Court seeking an injunction against enforcement of the rules against it.

On January 22, 1969, in response to the special relief petition of the UHF stations, the Commission entered a temporary order that prohibited petitioner's carriage of New York City signals *pendente lite* and consolidated the petition into the previously instituted Philadelphia market-wide CATV proceeding. R. 173a. Petitioner sought review of this order in the Court of Appeals, together with rule 74.1105(c) and the "interim procedures" of the December 1968 proposed rules insofar as they "froze" action on the special relief petition against petitioner's carriage of New York City signals. R. 197a-213a.

The District Court granted petitioner the relief it sought in that court. R. 382a. The government appealed and the case was consolidated with the petitions for review filed by petitioner in the Court of Appeals. That court reversed the District Court and upheld the challenged actions of the FCC. It sustained rule 74.1105(c), which provides for a stay of proposed CATV service challenged in a special relief petition pending action on the petition, as "a vital part of the FCC's total regulatory concept, adopted in a comprehensive rulemaking proceeding" and a necessary procedure to prevent entrenchment of CATV operations before the Commission can review their public interest implications. Pet. App. 41a. It also rejected the claim that the FCC had delayed unduly in acting on the UHF stations'

special relief petition, holding that "in considering these complex public-interest problems, the FCC was not bound by the same strict limitation which binds courts in the consideration of temporary restraining orders." Pet. App. 42a. It noted that the FCC had already established a firm policy in the Philadelphia market that required a stay of petitioner's proposed carriage of New York City signals. Pet. App. 44a. It held that petitioner had no right to a hearing and no right to commence carriage of New York City signals.

REASONS FOR DENYING THE WRIT

The petition does not present any question warranting review under the standards of this Court governing certiorari. There is no conflict among the circuits and no conflict with prior decisions of this Court. Petitioner's challenge of a procedural rule established by the FCC as part of an administrative mechanism necessary to implement considered regulatory policy is insubstantial and in any event was fully considered by the Court of Appeals. Additionally, the question presented appears to be moot.

1. The stay provision of rule 74.1105(c) is clearly lawful. It is, as the court below recognized, "an integral part of the FCC's regulatory scheme designed to provide for prior agency consideration of important problems posed by CATV service." Pet. App. 42a. Petitioner now concedes that a system for review of CATV proposals prior to commencement of service is necessary, and that such a review system may be triggered by objections of an interested party. Pet., p. 10. Its argument against rule 74.1105(c) is that there is no provision for some official to review the special relief petitions and determine their merit before any stay becomes effective. Yet clearly such a requirement would undermine the objective of preventing the commencement of CATV service prior to FCC determination

of public interest questions.[9] Given the hundreds of such petitions submitted to the Commission, some device to prevent commencement of operations until the initial review of the pleadings is indispensable to the FCC's regulatory scheme, as the court below recognized.

In this case the stay of section 74.1105(c) operated for five months, from the time the pleadings were completed until the Commission issued its temporary order on January 22, 1969. The Court of Appeals held that this period "did not appear unreasonable in view of the large number of similar matters then pending before the FCC for consideration" (Pet. App. 43a), the fact that over a month prior to the issuance of the temporary order the Commission had issued its proposed new rules which determined tentatively that operations like petitioner's proposed carriage of New York City signals would be contrary to the public interest, and the fact that the Commission's policy in the Philadelphia market had been clearly established just two months prior to the filing of petitioner's notice. As the court observed, petitioner "was aware that, consistent with FCC policy for the Philadelphia market, its challenged carriage of New York signals would be further stayed pending an area-wide hearing." Pet. App. 44a. Under all these circumstances, the operation of the rule 74.1105(c) stay in this case was clearly reasonable, and the case presents no question as to that rule requiring review by this Court.[10]

[9] There is no general principle that such official review is required regardless of the nature of the restraint, and petitioner cites no such authority. The "survey" of other administrative agency provisions does not even purport to examine comparable situations, let alone to establish a constitutional or statutory limitation on what procedures are permissible. Pet., pp. 7-8. The only federal authority cited that does involve limitations relates to "search warrants, arrest warrants and . . . orders permitting building inspections," Pet., p. 9, which are hardly relevant to the conditions on which radio and television signals may be extended beyond their normal range.

[10] Even if the stay was in force for an unduly long period in this case, petitioner was not entitled to commence the challenged service but merely to seek judicial assistance to compel FCC action on the

[footnote continued]

2. Petitioner's effort to invoke this Court's decision in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, is unavailing. In that case the Court upheld a temporary FCC order issued at the outset of the proceeding prohibiting the CATV operations then in question *pendente lite*. The rationale for that decision was that "'the administrative process [must] possess sufficient flexibility to adjust itself' to the 'dynamic aspects of radio transmission'" (392 U.S. at 180) and that the Commission possessed the authority to preserve an existing situation pending its determination of whether the challenged CATV operations are consistent with the public interest. That is precisely the role played by the stay provision in rule 74.1105(c). The fact that in *Southwestern Cable* the Commission had reviewed the pleadings before entering its temporary order,[11] whereas in this case rule 74.1105(c) operated to fill the gap until the Commission could review the pleadings, does not make *Southwestern Cable* any less applicable. If anything, the rule 74.1105(c) stay provision, by preserving the situation until the Commission can review the pleadings, is indispensable to the successful implementation of the interim relief procedures sustained in *Southwestern Cable*.[12]

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special relief petition. See Pet. App. 44a. Commencement of operations by petitioner on December 19, 1968, was particularly inappropriate in the face of the earlier Commission determination of policy for CATV in the Philadelphia market and its tentative determination announced on December 13, 1968, that CATV operations of the kind proposed by petitioner were so clearly contrary to the public interest that they should be barred by rule.

[11] Rule 74.1105(c) was inapplicable in that case because the challenged operations had commenced prior to adoption of the Commission's rules.

[12] Petitioner complains that the evidentiary hearing in this case has been indefinitely deferred pending a rulemaking proceeding and that this further distinguishes Southwestern Cable. But it is beyond dispute that an agency has considerable flexibility in determining whether to proceed by rule making or adjudication. F.P.C. v. Texaco, 377 U.S. 33, 39-44; United States v. Storer Broadcasting Co., 351 U.S. 192, 200-05. Here it was unquestionably within the Commis-

[footnote continued]

3. Petitioner's failure to present a question as to the January 22, 1969, order of the FCC renders moot its challenge to the stay provision of rule 74.1105(c). The stay provision was in effect from the filing of the special relief petition until the Commission's January 22, 1969, temporary order prohibiting petitioner from carrying New York City television signals pending disposition of the Philadelphia market-wide CATV proceeding. That order is still outstanding and in effect. Although petitioner challenged it in the court below, it does not challenge the order in its certiorari petition. Thus, even if petitioner were correct that the stay of rule 74.1105(c) should not have applied to it, it is nonetheless subject to the January 22, 1969, order.[13] Accordingly, resolution of the question presented in the petition would have no practical consequence.

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sion's discretion to defer pending adjudication proceedings while it considered new rules that would determine the issues in the pending proceedings. See, *e.g.*, Kessler v. F.C.C., 326 F.2d 673 (D.C. Cir. 1963); Harvey Radio Laboratories v. United States, 289 F.2d 458 (D.C. Cir. 1961); Mesa Microwave, Inc. v. F.C.C., 262 F.2d 723 (D.C. Cir. 1958).

[13]Petitioner asserts, without citation, that the Court of Appeals "disregarded" the January 22, 1969, order in reaching its decision. Pet., p. 15, n.4. To the contrary, the court below relied on the January 22, 1969, order. See Pet. App. 43a, 44a. Petitioner also advances several arguments in an effort to avoid the effect of the January 22, 1969, order. Pet., pp. 15-16, n.4. The claim that the order merely continues the stay of rule 74.1105(c) is clearly incorrect. By its terms, rule 74.1105(c) applies only until the Commission rules on the special relief petition "or on the interlocutory question of temporary relief pending further procedures." The January 22, 1969, order was such an interlocutory ruling; it permitted the carriage of Philadelphia and Wilmington signals but no others *pendente lite*. Pet. App. 3a. Petitioner's other contentions are to the effect that the January 22, 1969, order ought not have been entered. But it was entered, it is in force, the arguments against it were rejected by the court below, and its validity has not been presented to this Court for review.

CONCLUSION

The petition for writ of certiorari should be denied.

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